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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/680,349	10/07/2003	David H. Walker	D6152CIP2/DI/D	5963

7590 02/24/2006

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Austin, TX 78701

EXAMINER

MINNIFIELD, NITA M

ART UNIT	PAPER NUMBER
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1645

DATE MAILED: 02/24/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/680,349

Applicant(s)

WALKER ET AL.

Examiner

N. M. Minnifield

Art Unit

1645

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 December 2005.
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-7 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1 and 3-7 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 01/03/06.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. Applicants' amendment filed December 5, 2005 is acknowledged and has been entered. Claim 1 has been amended. Claim 2 has been canceled. New claims 3-7 have been added. Claims 1 and 3-7 are now pending in the present application. All rejections have been withdrawn in view of Applicants' amendment to the claims and/or remarks, with the exception of those discussed below.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Claims 4-7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims are vague and indefinite in that the claims depend from a claim directed to a polypeptide only, however claims 4-7 recite that a carrier, adjuvant or pharmaceutically acceptable carrier further comprise the polypeptide. Does Applicant intend for claims 4-7 to be directed to a *composition* that *comprises* the *polypeptide* as set forth in claim 1 as well as a *carrier, adjuvant* or *pharmaceutically acceptable carrier*?
4. Please note that the effective filing date for the pending claims is September 12, 2000, which is the date the full amino acid sequence of SEQ ID NO: 2 was first disclosed. SEQ ID NO: 2 was first disclosed in 09/660,587 filed September 12, 2000.

5. Claims 1 and 3-7 are rejected under 35 U.S.C. 102(b) as being anticipated by Rikihisa et al (WO 99/13720).

Rikihisa et al (WO 99/13720), discloses a recombinant polypeptide of at least 20 residues but less than 280 residues, and the polypeptide comprises amino acid residues 61-86 of claimed SEQ ID NO: 42. The prior art discloses a polypeptide that is 165 residues and comprises the same 26 amino acid residues as set forth in amino acid residues 61-86 of SEQ ID NO: 42 (see attached sequence search result printouts). The prior art discloses recombinant means of making a polypeptide (pp. 15-16). The prior art discloses compositions comprising the polypeptide and an adjuvant (p. 12) and that the polypeptide can be an antigen or immunogen (p. 2; p. 12). It is noted that an adjuvant can be a carrier or a pharmaceutically acceptable carrier.

The rejection is maintained for the reasons of record. Applicant's arguments filed December 5, 2005 have been fully considered but they are not persuasive. Applicants have asserted that claim 1 as amended herein is not taught by Rikihisa et al (WO 99/13720) and respectfully request removal of the rejection.

However, as set forth above the prior art discloses a polypeptide that is 165 residues and comprises the same 26 amino acid residues set forth as amino acid residues 61-86 of SEQ ID NO: 42. The prior art anticipates the claimed invention. Since the Patent Office does not have the facilities for examining and comparing applicants' polypeptide with the polypeptide of the prior art reference, the burden is upon applicants to show a distinction between the material structural and functional characteristics of the claimed polypeptide and the polypeptide of the

prior art. See In re Best, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and In re Fitzgerald et al., 205 USPQ 594.

6. Claims 1 and 3 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Both claims are directed to a product, recombinant polypeptide; this polypeptide is the only component found in either of the product claims.

7. No claims are allowed.

8. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

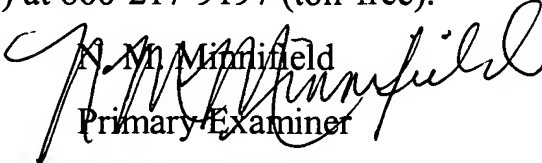
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will

be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. M. Minnifield whose telephone number is 571-272-0860. The examiner can normally be reached on M-F (8:00-5:30) Second Friday Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lynette R.F. Smith can be reached on 571-272-0864. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


N. M. Minnifield
Primary Examiner
Art Unit 1645

NMM

February 17, 2006